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In The

SUPREME COURT OF THE UNITED STATES

October Term 1948

No. 432

E. E. SWALLEY, PETITIONER-PLAINTIFF,

V.

ADDRESSOGRAPH-MULTIGRAPH CORPORATION, RESPONDENT-DEFENDANT.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable the Supreme Court of the United States:

STATEMENT.

A. Introduction.

This is the second time that petitioner-plaintiff has sought a writ of certiorari in this case. Petitioner-plain-

tiff's first petition for a writ of certiorari was filed in the October Term, 1946, as Case No. 1072, and on that occasion certiorari was denied (*E. E. Swalley* v. *Addressograph-Multigraph Corporation*, 330 U. S. 845, 67 Sup. Ct. 1086, 91 L. Ed. 1290).

The petitioner's summary statement is entirely inadequate and is confusing. Because petitioner devotes a portion of his brief to challenging the correctness of the original decision in this case by the Circuit Court of Appeals (158 Fed. [2d] 51), and which challenge was previously made in the first petition for writ of certiorari, which was denied by this Court, we have undertaken to again restate the facts of this case so that the Court will not be required to examine the briefs of the former certiorari proceedings. The references to the record referred to in this Statement are to the record in the prior certiorari proceedings, Case No. 1072.

With respect to the record in the present proceeding, there was served on attorneys for respondent a purported transcript of record which starts with printed page numbered 33 and runs to printed page numbered 70, inclusive. References in petitioner's brief indicated that the record filed with the Court contains additional pages numbered 1 to 32, and the Clerk of this Court has advised that this is the fact. This portion of the transcript has not been served upon respondent or respondent's attorneys. This omission was directed to petitioner's attention by the respondent at the time of service. (See notations by respondent on proof of service filed by petitioner in the office of the Clerk of this Court.)

It would seem that the failure to properly serve a complete copy of the transcript on respondent would be grounds for denying certiorari (see *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90 L. Ed. 1099). In view of the shortness of time within which to prepare this reply brief, we are not informed as to the full contents of the transcript of record on file in the Clerk's office and, therefore, have been required, when referring to the record in the present proceeding, to assume that certain of the earlier proceedings are in the record, but the reference has necessarily had to be without identifying the page numbers in the transcript where such proceedings appear.

B. Facts.

(References are to record in Case No. 1072)

The petitioner was employed as a Sales Agent for respondent in March of 1941 for the state of Alabama and certain enumerated counties in Florida. He resigned his employment in March of 1943. The petitioner brought this action to recover, among other things, commissions which he alleged to have been due him under the Sales Agency Contract on sales to the United States of America, War Department, Air Corps, covered by three purchase orders Nos. 42-15979, dated March 31, 1942 (R. 281); No. 42-19531-P, dated May 18, 1942 (R. 289); and No. 42-19532-P, dated May 20, 1942 (R. 295).

The petitioner's cause of action as contained in his complaint sought the entire commission on the products covered by the above described War Department purchase orders, but on the trial of the case, the evidence

established that these War Department purchase orders were not procured by the petitioner, but were procured by the respondent's Sales Agent in Dayton, Ohio. The trial court found that the petitioner had not made the sales and denied the petitioner the entire commission, as claimed, and the petitioner took no appeal from this decision. The trial court, however, found that the petitioner was entitled to 75% of the entire commission on these three purchase orders, based on the sale by the respondent's Sales Agent in Dayton, Ohio. The respondent took an appeal from this judgment and the Circuit Court of Appeals, in reversing the judgment of the District Court, held that the petitioner was not entitled to any portion of the commission on these three orders.

The Agency Contract (R. 246) contained a provision providing for the splitting of the entire commission where the sale was made by an agent in one territory, but the equipment sold was "for use" or "to be used" in another agent's territory. Under such circumstances the contract provided that 25% of the entire commission would be payable to the agent making the sale, and 75% of the entire commission to the agent in the territory where the equipment was to be used (Par. 8 of the Contract, R. 248).

It is to be noted that this provision is contrary to the ordinary commission contract where the entire commission is paid to the agent actually making the sale, regardless of where the equipment sold is actually used. The reason for this variation from the ordinary commission contract and the justification for giving 75% of the entire commission to an agent who participated in no way in making the sale, and in whose territory the sale

was not made, is explained by the fact that the agent in whose territory the machines are to be used has the expense of installing these machines, training the customer's employees in the operation of the machines and servicing the machines for the customer as such service is required (R. 54, 58, 59, 62, 63, 64, 66, 173-175, 199-200). The respondent's standard order form which was used by all agents and by this petitioner during all times he was employed by the respondent and which each agent, including this petitioner, was required to sign at the time that an order was taken, contained a clause wherein the agent is required to state the place where the equipment will be "kept and installed" (R. 312; R. 316).

Prior to October of 1941, the War Department began making substantial purchases of equipment on their own special forms calling for delivery to Army Depots for temporary storage. The machines, when delivered to these Depots, were not required to be installed or maintained, nor was there any requirement for the training of operators, since these obligations would not arise until the machines were reshipped from the Depots to some activity for actual use. The respondent, to remove any doubt as to the right to commissions on such sales, issued a bulletin to all of its agents, including the petitioner, dated October 31, 1941, which provided in part as follows:

> "2. When equipment is shipped from factory to an Army Depot, it is considered as 'in transit' and Sales Agent in whose territory that General Depot is located will be entitled to no commission and quota credit, for obviously such equipment will not be installed for use at the Depot, and War Department will decide where that equipment is to go.

"3. On shipments where final destination is not known, as to General Depots, the 75% share of the commission will be carried on company's books as a liability and paid later when it is definitely ascertained who is entitled to this commission." (Respondent's Ex. 18, R. 309.)

The three purchase orders from the War Department, Army Air Force, involved in this case as above noted were not received until March 31, 1942, May 18, 1942 and May 20, 1942, respectively. They were obtained by the respondent's Sales Agent at Dayton, Ohio, which was outside the petitioner's territory, and the respondent's Dayton agent was paid 25% of the entire commission (R. 152, 192). The officers who executed the purchase orders on behalf of the War Department had never dealt with or heard of the petitioner (R. 141, 142). The purchase orders called for shipments of equipment to six Army Depots located throughout the United States, only one of which was the Mobile Depot which was located in petitioner's territory. The Army Air Force intended that the shipments to the Depots were for the purposes of temporary storage until such a time as the equipment would be needed at the various air fields, air bases and training centers for use therein, at which time the equipment would be reshipped to such activities (R. 140). The equipment, when it reached the Mobile Air Depot, was not removed from its original shipping crates (R. 137). The final disposition and use of this equipment remained under the control of the Air Service Command at Dayton, Ohio, who ordered the reshipment of this equpment from the temporary storage Depots to the activity at which the equipment would be used (R. 138). Under such order from the Air Service Command, some of the equipment covered by the above described

three purchase orders was reshipped from the Mobile Depot to the air bases, etc., located in petitioner's territory, which equipment was installed by petitioner for use and he thereupon claimed and was paid 75% of the entire commission, or a total of $6,324.94. As to the other machines shipped under the above described three purchase orders to the Mobile Depot (which storage Depot supplied five states which were not included in petitioner's territory [R. 136-137]), these machines were installed by the agents in territories other than petitioner's and they were paid the remaining 75% of the entire commission. The commission which the petitioner claims in this case is on the equipment sold under the above described three purchase orders, which was temporarily stored in its original shipping crates in the Mobile Depot and thereafter, on direction of the Air Service Command at Dayton, Ohio, reshipped out of the Mobile Depot and into the territory of other Sales Agents of respondent and by them installed for use in their territories.

A short time after the above described three purchase orders from the War Department had been obtained in Dayton, petitioner learned of the orders and telephoned Mr. Hitchcock, a Sales Manager of the Multigraph Division of respondent, and during that conversation asked Mr. Hitchcock if petitioner would get a commission on any machines that remained in storage in the Mobile Depot for ninety (90) days, to which Mr. Hitchcock replied that he would not; that commissions on these machines would be paid when they were installed for use (R. 160, 115, 126); and Mr. Hitchcock further stated that the machines were shipped into the Depot for storage and for all practical purposes were in transit and

"that the work had to be done after the machines were sent to the activity and installed for use, and that in fairness to all our other men who really had to do the work, and in line with the way we had handled similar situations that was the way we were going to handle this" (R. 161). Petitioner made no protest nor expressed any objection or disagreement with this statement.

Shortly after shipments were being started under the above described three purchase orders of the War Department, a second bulletin was issued to the agents under date of September 21, 1942, reiterating the manner of distribution of commissions on such orders as stated in the October 31, 1941, bulletin (Def. Ex. 7, R. 302). This bulletin also set up a procedure for the agents to follow in making requests for commissions when machines covered by the above described three War Department purchase orders were actually installed. The petitioner expressed no objection or disagreement with the terms of this bulletin and subsequently made claims for commissions on the forms provided for machines covered by the above described three War Department purchase orders for machines actually installed by him in his territory; and petitioner made no request for commissions on any machines which were merely in temporary storage in the Mobile Depot (R. 43, 117). In one instance, the petitioner claimed and was paid a commission on a machine which was covered by one of the above described three War Department purchase orders which had been originally shipped to the Middleton Army Depot (which was located outside petitioner's territory) and was subsequently reshipped from that Depot into petitioner's territory and installed by him therein (R. 298). Under the theory advanced by

petitioner for recovery in this case, that commission should have been payable to the agent in whose territory the Middleton Depot was located but, nevertheless, the petitioner claimed and was paid this commission in the sum of $1,075.00 (R. 100, 101, 298).

The respondent furnished petitioner monthly statements on which were shown all of the debits and credits to petitioner's account each month, including commissions credited, and each commission credit was supported by an invoice identifying the particular transaction for which the commission was paid (R. 210, 217). The petitioner was given credit for 75% of the entire commission on all machines covered by the above described three purchase orders which were installed by him for use in his territory (R. 219), but petitioner was not given credit for any commission on machines shipped to the Mobile Depot for storage (R. 219). The petitioner never objected to the balance of his account as shown on each of these monthly statements (R. 220) * * * and never, at any time during his employment, made any claims for commissions on machines which were not installed in his territory (R. 43,117), although petitioner did not resign until March of 1943 (R. 105).

C. Chronology of This Case.

1. Suit was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, and the case was tried to the District Judge under a written stipulation waiving a jury. The Judge made findings of fact and conclusions of law and ordered judgment for the petitioner.

2. Respondent appealed to the United States Circuit Court of Appeals for the Seventh Circuit, which court found that the contract was not ambiguous and that "since an erroneous construction was placed upon this contract by the trial court, the judgment is reversed and the cause remanded to the District Court for proceedings in accordance with this opinion." This opinion is reported in 158 F. (2d) 51, and we assume it is also incorporated in the present record.

3. After petition for rehearing was denied by the United States Circuit Court of Appeals, petitioner filed a petition for writ of certiorari and a brief in support thereof in this Court. See Case No. 1072. This Court denied the petition for certiorari (330 U. S. 845, 67 Sup. Ct. 1086, 91 L. Ed. 1290).

4. After the denial of the petition for certiorari, the mandate of the United States Circuit Court of Appeals for the Seventh Circuit was forwarded to the Clerk of the District Court and thereafter respondent filed a motion for judgment in accordance with the mandate. The petitioner filed no motions, applications or pleadings in the District Court, but after respondent had filed its motion for judgment and before the District Court had ruled thereon, the petitioner filed a motion in the United States Circuit Court of Appeals for the Seventh Circuit and filed a brief in support thereof whereby the petitioner sought to have the Circuit Court of Appeals either (1) clarify its mandate in respect to the jurisdiction and power of the trial court to grant a new trial or rehearing, and/or (2) modify its original mandate so as to confer jurisdiction and power upon the trial court, or issue a special mandate directing the trial court to grant

a new trial or rehearing. The Circuit Court of Appeals denied the petitioner's motion and thereafter, on June 24, 1947, the District Court entered a judgment in favor of the respondent. (The respondent's motion in the District Court for judgment, the petitioner's motion in the Circuit Court for clarification of mandate, and the District Court's judgment should be included in the transcript in the present case.)

5. The order of the District Court of June 24, 1947, further provided that "the defendant recover from the plaintiff its costs to be taxed by the Clerk of this court." On June 27, 1947, the respondent presented its verified bill of costs which it proposed the Clerk tax, and gave petitioner notice that application would be made to the Clerk to tax the same on July 1, 1947. The petitioner filed on July 2, 1947, his answer to motion of respondent, opposing and contesting the motion of respondent "to tax as court costs the amounts paid for premiums on the supersedeas appeal bond," and presented his points and brief in support of said answer. Thereafter, on July 2, 1947, the Clerk taxed the costs as shown in said verified bill of costs. On July 7, 1947, the petitioner filed a motion requesting the court to retax the costs, and respondent filed a counter-motion that the court tax the costs as entered by the Clerk. On September 10, 1947, the District Court overruled the petitioner's motion and sustained the respondent's motion for a judgment, and a judgment for costs in the amount of $4,269.33 was entered (all of these proceedings were included in the transcript before the Circuit Court of Appeals and should be in that portion of the transcript of record in this case which was not included in the transcript served upon respondent).

6. Petitioner appealed to the United States Circuit Court of Appeals for the Seventh Circuit from the order of the District Court of June 24, 1947, which entered the order for judgment in favor of the respondent. The judgment was affirmed. The opinion is reported in 168 F. (2d) 585 and appears on pages 57 to 61 in the record filed in connection with this petition.

7. Thereafter, petitioner filed a petition for rehearing in the Circuit Court, which was denied, and the matter is now presented to this Court on the petition for writ of certiorari to review the judgment of the Circuit Court of Appeals last entered.

ARGUMENT.

The decision of the Circuit Court of Appeals which is found in 168 F. 2d 585, appears at pages 57 to 61 in the record filed in connection with this petition. A consideration of the grounds upon which the opinion of the Circuit Court of Appeals was based discloses clearly that there are no questions presented in the petition for writ of cetiorari of such character as to require determination by this Court, and that the petition fails to present any recognized ground for the exercise of the jurisdiction of this Court under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347(a)).

I. The Circuit Court of Appeals Properly Stated the Law That, Where the Case is Tried by the Court Under a Written Stipulation Waiving a Jury and the Trial Court Makes Findings of Fact Which are Undisturbed on Appeal but Reverses the District

Court on a Proposition of Law, Upon Remand the District Court May Properly Enter Judgment That the Petitioner Take Nothing by His Complaint and the Respondent Recover Its Costs.

The Circuit Court of Appeals, in reversing the judgment of the District Court, did so on a proposition of law (see original opinion 158 F. 2d 51).

Any doubt that might exist as to the basis for the reversal in the first opinion was entirely eliminated in the second opinion of the Circuit Court of Appeals reported in 168 F. 2d 585 and found in the present record at page 57, wherein the court said at page 58:

> "The appeal to this Court in the first cause was from a judgment of the District Court after a trial at which a jury had been waived and in which the court had made findings of fact and stated its conclusions of law thereon. The findings of fact fully sustained the allegations of the complaint and were practically undisputed. We did not disturb the findings of fact. We disagreed with the District Court as to a proposition of law, namely, the construction of the contract sued upon. The District Court was reversed for that reason and that only. There was no question of fact involved, nor did we rule on the admissibility or nonadmissibility of the evidence, and, as the case was tried to the court, there was no question on instructions. The fact-finding process was in no manner affected. Where, as here, the cause is tried by the court, a jury having been waived, and the court makes findings of fact which fully cover the allegations of the plaintiff's complaint and which findings are sustained by the evidence and are in no manner disturbed on appeal and only a question of law is decided, upon remand there is nothing left to try, and the District Court

properly entered judgment that the plaintiff take nothing by his complaint and that the defendant recover its costs."

Under the circumstances existing in this case, it has been uniformly held that there is no violation of the Seventh Amendment to the United States Constitution, as contended by the petitioner, in entering judgment for the respondent, and this principle has been recognized in the following decisions of this Court:

City of Fort Scott v. *Hickman*, 112 U. S. 150, 164, 165, 28 L. Ed. 636, 641.

Allen v. *St. Louis National Bank*, 120 U. S. 20, 40, 30 L. Ed. 573, 578.

Cleveland Rolling Mill Co. v. *Rhoades*, 121 U. S. 255, 264, 30 L. Ed. 920, 923.

Redfield v. *Parks*, 132 U. S. 239, 252, 33 L. Ed. 327, 332.

Stanley v. *Schwalby*, 162 U. S. 255, 282, 40 L. Ed. 960, 969.

This Court has denied petitions for writs of certiorari in the following cases in which the Circuit Court of Appeals, under similar circumstances, had held that the petitioner was not entitled to a new trial after a reversal in the Circuit Court of Appeals.

City of Orlando v. *Murphy*, 94 F. (2d) 426; Cert. denied 299 U. S. 580; 81 L. Ed. 427.

Consolidated Products Co. v. *Blue Valley Creamery Co.*, 97 F. (2d) 23; Cert. denied 305 U. S. 629; 83 L. Ed. 403.

Herzberg's, Inc. v. *Ocean Accident & Guarantee Corporation*, 132 F. (2d) 438; Cert. denied 306 U. S. 645; 83 L. Ed. 1044.

And even in cases tried to the jury where the trial court improperly refused to sustain the defendant's motion for a directed verdict and a subsequent motion for a judgment notwithstanding the verdict, this Court has held that upon reversal plaintiff is not entitled to a new trial and that such a decision does not violate the Seventh Amendment to the Constitution:

Baltimore & Carolina Line v. *Redman*, 295 U. S. 654; 79 L. Ed. 1636.

And where the Circuit Court of Appeals reverses and directs a new trial where the reversal is based upon propositions of law, this Court, in *National City Bank of New York City* v. *Oelbermann*, 301 U. S. 48; 81 L. Ed. 918, ordered that:

> "the judgment is modified by substituting a direction for a judgment of dismissal on the merits with costs in place of the direction for a new trial and as so modified is affirmed. Baltimore & C. Line v. Redman, 295 U. S. 654, 79 L. Ed. 1636, 55 S. Ct. 890."

Compare *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U. S. 511; 64 L. Ed. 381.

The earlier cases of this Court establishing this rule have been uniformly followed in the Circuit Courts of Appeals and in the District Courts.

See

Goepfert v. *City of Beach*, 154 F. (2d) 743.
Wenborne-Karpen Dryer Co. v. *Cutler Dry Kiln Co.*, 21 F. (2d) 692.
Thornton v. *Carter*, 109 Fed. (2d) 316.
U. S. v. *Illinois Surety Co.*, 226 Fed. 653.

II. The Circuit Court of Appeals Stated in its Opinion That the Entry of the Judgment for the Respondent by the District Court was in Accordance with the Mandate of the Circuit Court of Appeals. This is a Complete Answer to Petitioner's Argument that the Action of the District Court Was Not In Conformity With the Mandate of the Circuit Court of Appeals.

On page 150 of petitioner's brief, petitioner contends that the action of the District Court in entering the judgment which it entered was not in conformity with the mandate and the opinion of the Circuit Court of Appeals issued and rendered at the time of the first appeal in this case (for this opinion see 158 F. 2d 51). This question, however, has been entirely eliminated from the case by the second decision of the Circuit Court of Appeals (168 F. 2d 585) (R. 57-61) holding that the District Court had properly construed its mandate. The court said in this regard:

> "In such a case, the only proceeding the District Court could have taken was to enter the judgment it entered upon our mandate. We did not by our mandate order a new trial; in fact, we declined to do so when we overruled the plaintiff's motion to modify and clarify our mandate. In this kind of a case, tried without the intervention of a jury, where the findings of fact are in no manner disturbed and only a question of law decided, we undoubtedly have the power to direct the District Court to enter the very order which it entered in this cause. *Thornton* v. *Carter*, 109 F. 2d 316, 319; *Consolidated Products Co.* v. *Blue Valley Creamery Co.*, 97 F. 2d 23. This we did not specifically do, but our opinion and mandate left no discretion to the District Court to do other than it did do. If the Dis-

> trict Court had any discretion in the matter, which we do not think it had, the plaintiff did not invoke the discretion of the District Court by tendering any amended pleadings to that court as the basis for granting him a new trial. Indeed, it has been held in a case similar to this one that the granting of a new trial even after the tender of amended pleadings was contrary to the mandate and therefore error. *Herzberg's Inc.* v. *Ocean Accident & Guarantee Corporation, Ltd.*, 132 F. 2d 438. The District Court correctly applied the mandate of this Court."

In making the above statement the Circuit Court of Appeals had in mind that the District Judge found for the petitioner in the first instance on the theory that the words "for use" or "to be used" in the contract would include machines which were merely stored in petitioner's territory while in transit to their ultimate destination outside of petitioner's territory (see District Judge Igoe's opinion, page 324 of Record in case No. 1072). In the first appeal the Circuit Court of Appeals did not agree with the District Court Judge's definition of the words "use" or "to be used" in the contract, and said:

> "The words 'use' and 'to be used' in Section 8 of the contract are employed in no different sense. We think that the contract is not ambiguous and that the words 'use' and 'to be used' are to be given their ordinary meaning, 'to employ; * * * to put into operation; to cause to function.' See Webster's New International Dictionary, Second Edition, 1941. The words 'use' and 'to be used' as employed in this contract are not synonymous with storage."

Upon remand to the District Court, District Judge Igoe was bound to follow the interpretation of the Circuit Court of Appeals and there was, therefore, nothing for

him to do but to enter judgment for defendant because the only commissions in controversy were those covered under the provisions of this contract, which provisions were defined by the decision in the Circuit Court, and as so defined defeated petitioner's claim.

III. The Additional Grounds Upon Which Petitioner Claims He is Entitled to a New Trial Were Presented to the Circuit Court of Appeals on Several Occasions and were Presented to this Court in Petitioner's First Petition for Certiorari, Which This Court Denied.

The petitioner states on page 14 of his brief that it is not his desire or intention to relitigate the matters which were adjudicated on the first appeal; however, the grounds which petitioner asserts entitle him to a new trial (see pages 28 to 31, under point F, Petitioner's Brief), indicate clearly that this is exactly what petitioner desires to do. All of these points have been previously presented for consideration at one time or another to the Circuit Court of Appeals and to this Court in the following manner:

(1) Motion for leave to file a petition for rehearing and in the brief filed in support thereof, all of which was filed with the Circuit Court of Appeals subsequent to the filing of the first opinion in this case by the Circuit Court of Appeals.

(2) Petition for writ of certiorari filed in this Court complaining of the first opinion of the Circuit Court of Appeals in this case, said petition being in case No. 1072. At that time respondent filed a reply to the petition for certiorari, which reply answered

the grounds then and now relied upon (pages 8 to 23 of Respondent's Brief—case No. 1072). Since the court denied that petition for certiorari, we will not burden the Court with a restatement of what was said in that reply brief.

(3) Motion for clarification or modification of the mandate and brief in support thereof filed by the petitioner with the Circuit Court of Appeals.

(4) Brief of petitioner filed with the Circuit Court of Appeals for the Seventh Circuit on the second appeal to that court, from the judgment of the District Court which had been entered in accordance with the mandate.

It is presumptuous for petitioner to assume that all of these matters which he now again urges in his present petition for writ of certiorari have not been considered by the courts to whom they were presented. Since the points upon which petitioner relies have been presented and found to be without merit, we submit this Court should again come to the same conclusion.

The practice of re-presenting the same issues over and over again by repeated appeals was properly condemned in the case of *Thornton* v. *Carter*, 109 F. 2d 316, in the following language:

> "There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

IV. The Premiums on Supersedeas Bonds are Properly Taxable as Costs in the District Court of the United States for the Northern District of Illinois, Eastern Division.

It has been a long established principle that the District Court has the power to establish by its rules of court what disbursements shall be taxed as costs.

Williams v. *Sawyer Bros.*, 51 F. 2d 1004, 1005.
W. F. & John Barnes Co. v. *International Harvester Co.*, 145 F. 2d 915, 917; 7 C. C. A.
Parkerson v. *Borst*, 256 Fed. 827.
The Texas, 226 Fed. 897.

The rules of court promulgated by the District Court of the United States for the Northern District of Illinois, Eastern Division, from which court this appeal was taken, provide in part as follows:

> "Rule 20. Bond Premiums—Taxable as Costs. If costs shall be awarded by the court to either or any party then the reasonable premiums or expense paid on all bonds or stipulations or other security given by that party in that suit shall be taxed as a part of the costs of that party."

Since the District Court has the power to establish by its rules the disbursements that shall be taxable as costs, and since the District Court did by rule provide that all bond premiums should be taxed as costs, the judgment of the District Court was clearly right in assessing such disbursements as costs.

The petitioner argues that Rule 20 was intended to cover only "an ordinary appeal bond" and not a "supersedeas appeal bond." The language of Rule 20 leaves

no ground for such an argument. The title is "Bond Premiums—Taxable as Costs." This is not limited to certain particular types of bonds, but is general and unqualified in its scope. In the body of the rule in speaking of the premiums which may be assessed as costs the rule refers to "the reasonable premiums * * * paid on *all* bonds." In the face of this language it is doubtful if petitioner is serious in his contention. Even if the rule were incomplete or ambiguous the courts would interpret it to include the premium on all types of bonds filed in the cause. In the case of *Williams* v. *Sawyer Bros.*, (51 F. 2d 1004), the issue was the right of the District Court to tax as costs premiums paid on an attachment bond. While it was shown that it had been the practice of the court to assess as costs premiums on certain types of bonds, the evidence showed that the premium on this type of bond had never been assessed as costs. The court held that the existence of the usage and practice of assessing as costs premiums paid on certain type of bonds esablished "a general usage which comprehends *all* cases where surety company bonds are required, either to release property, or as to any other kind of security."

Petitioner in his brief, at pages 32, 33 and 34, suggests that the filing of the supersedeas bond by the respondent at the time of its appeal from the adverse decision first rendered by the District Court was a voluntary choice by the respondent for its own special benefit, and that respondent could have gained the advantage of staying the judgment without the expense of a supersedeas appeal bond by merely obtaining the petitioner's consent or agreement to a stay pending the

appeal, and that "this the defendant did not choose to do." The petitioner neglects to mention that he made a motion to require the respondent to file a stay of execution bond, and that the court entered an order that the "execution would be stayed only until March 28, 1945, without bond" (petitioner should have included this in the transcript of record filed in this case; however, it may be found in the record in the previous case No. 1072, page 342).

The record further shows that the stay bond and supersedeas bonds on which the premiums were taxed were filed under orders of the District Court (if petitioner did not include these orders in the present record they can be found at pages 342 and 352, respectively, in the record of case No. 1072).

The argument is further answered in the case of *Land Oberoesterreich* v. *Gude,* (93 F. 2d 292), wherein the court said, "It was the erroneous judgment obtained by the plaintiff that made it necessary for the defendants to obtain a supersedeas or run the risk of having the judgment collected by the plaintiff. We think defendants ought not to be required to run the risk of making such a payment and seeking a refund if the judgment should later be held to have been erroneously rendered. In other words, the premiums ought to be regarded as a reasonably necessary expense of the appeal."

The cases cited by petitioner as alleged authority for the proposition that such premiums are not properly taxable as costs were all from jurisdictions wherein there were no rules of court which made such disbursements

taxable costs. As already stated, that is not the case here and, therefore, those cases are not in point. The cases cited by petitioner are referred to in *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 68 L. Ed. 909, as follows:

> "In Lee Injector Mfg. Co. v. Penberthy Injector Co. (C. C. A. 6th Cir.) 48 C. C. A. 760, 109 Fed. 964; The Gov. Ames (C. C. A. 1st circuit) 109 C. C. A. 94, 187 Fed. 40, 48; The Texas (C. C. A. 3d circuit) 226 Fed. 897, 905; Parkerson v. Borst (C. C. A. 5th circuit) 168 C. C. A. 173, 256 Fed. 827; Re Hoyt, 119 Fed. 987 (D. C.); and in The Willowdene, 97 Fed. 509 (D. C.), it is held that where the disbursement is not made as the result of any rule of practice, and there is no statute, rule, or usage by which it is made a part of the taxable costs of the case, it cannot be allowed. In The Texas (C. C. A. 2d circuit) 226 Fed. 897, 905, the circuit court of appeals of the third circuit, after expressing its approval of the view that a rule of court or a practice equivalent thereto is necessary to justify the taxation of such costs, said:
>
> > "But we may also say that we think such a rule or practice has become so desirable that we feel confident the court below will take an early opportunity to conform its procedure in this respect to the custom prevailing in other districts."

CONCLUSION.

Much of the petitioner's argument is devoted to matters not pertinent to the grounds for granting certiorari as cited in the petition, and in view of the inhibition of Rule 38, we have refrained from discussing such matters.

We respectfully submit there is no reason for the exercise by this Court of its power to grant a writ of certiorari.

Respectfully,

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